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In The

# Supreme Court of the United States

GRACE HENZLER, BERNICE GEORGE JOSEPH, RICHARD JAMES, SR., EDDIE JAMES, LOUIS JAMES, WINSTON JAMES, and NORA JAMES DRESCHER,

*Petitioners,*

v.

KEN SALAZAR, in his official capacity as Secretary of the Interior, WILMA LEWIS, in her official capacity as Assistant Secretary of the Interior for Land and Minerals Management, BOB ABBEY, in his official capacity as Director, Bureau of Land Management, THOMAS LONNIE, in his official capacity as Alaska State Director, Bureau of Land Management, and UNITED STATES OF AMERICA,

*Respondents.*

**On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit**

## PETITION FOR A WRIT OF CERTIORARI

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## QUESTION PRESENTED

In 1920 the Department of the Interior approved an application that Dick George, an Athabascan Indian, had filed pursuant to the Alaska Native Allotment Act to obtain a certificate of allotment for a 160-acre parcel of public land in Alaska. In 1930 the Department vacated the approval and rejected the application. Prior to doing so the Department mailed Mr. George a written notice that, because he had signed his application with his mark, the Department knew Mr. George could not read. The notice informed Mr. George of the Department's intended action. But the notice did not inform Mr. George that he had a legal right to be issued a certificate of allotment for the parcel if he wished. The Ninth Circuit held that the notice did not violate Mr. George's right to due process. The question presented is:

Whether the Ninth Circuit correctly held – in conflict with decisions of this Court and the Interior Board of Land Appeals – that divesting a Native American who the Department of the Interior knows is illiterate of a vested property right by mailing the individual a written notice whose content did not inform the individual of his legal rights when the Department knew that the individual could not reasonably have been expected to educate himself about those rights did not violate the Due Process Clause of the Fifth Amendment.

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## PETITION FOR A WRIT OF CERTIORARI

Grace Henzler, *et al.*, the heirs of Dick George, petition for a writ of certiorari to review the judgment of the U.S. Court of Appeals for the Ninth Circuit in this case.

## OPINIONS BELOW

The Ninth Circuit memorandum decision, which was not reported, is reprinted at Appendix (App.) 1. The decision affirmed an order of the U.S. District Court for the District of Alaska, which was not reported, and is reprinted at App. 3. The Ninth Circuit order denying a petition for rehearing *en banc* is reprinted at App. 27.

## JURISDICTION

The Ninth Circuit memorandum decision was entered on August 26, 2010. App. 1. A petition for rehearing *en banc* was denied on October 20, 2010. App. 27. The jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 1254(1).

## CONSTITUTIONAL PROVISION INVOLVED

The Fifth Amendment of the United States Constitution provides:

> No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

## INTRODUCTION

This case presents an issue of paramount contemporary importance to Alaska Natives and other Native Americans.

In 2000 (the most recent year for which statistics are available) 10.3 percent – 247,000 – of the 2.4 million individuals in the United States who identified themselves as Native American reported that they did not speak English at home and that outside the home they spoke English less than "very well." *See* U.S. Census Bureau, *We the People: American Indians and Alaska Natives in the United States* 7

(2006).[1] Thirty-four percent – 816,000 – of those 2.4 million individuals live either on Indian reservations in the coterminous states or in one of more than two hundred small rural communities in Alaska that Congress has designated as "Native villages" for the purposes of the Alaska Native Claims Settlement Act, 43 U.S.C. §§ 1601 *et seq*. *See We the People* 14.

In *Seminole Nation v. United States*, 316 U.S. 286, 297 (1942), this Court held that in its dealings with Native Americans the federal government has "moral obligations of the highest responsibility and trust" that require the government's conduct to be "judged by the most exacting fiduciary standards."[2]

One of the most important of those moral obligations is the obligation that the Fifth Amendment imposes on the Department of the Interior, which is responsible for administering most statutes that

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[1] Available at http://www.census.gov/population/www/socdemo/race/censr-28.pdf

[2] In *Aguilar v. United States*, 474 F. Supp. 840 (D. Alaska 1979), the U.S. District Court for the District of Alaska directed the Secretary of the Interior to recover title to parcels of public land described in certain Alaska Native Allotment Act applications that the Bureau of Land Management (BLM) had erroneously conveyed to the State of Alaska. When it so directed, the District Court, citing *Seminole Nation*, noted: "In its relationship with Native Americans the government owes a special duty analogous to those of a trustee. These 'exacting fiduciary standards' apply to the federal government in its conduct toward Alaskan Natives." (citations omitted) *Id*. 846.

Congress has enacted to benefit Native Americans, to not deprive any Native American of property without due process of law.

One hundred and fifty years ago this Court instructed that "No principle is more vital to the administration of justice, than that no man shall be condemned in his person or property without notice." *Boswell's Lessee v. Otis*, 50 U.S. 336, 350 (1850). And in *Mullane v. Central Hanover Bank & Trust Company*, 339 U.S. 306, 315 (1950), the Court instructed that, when notice is required, "a mere gesture is not due process." Because to satisfy the requirements of due process notice must be "reasonably calculated, under all the circumstances, to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections. The notice must be of such nature as reasonably to convey the *required* information. . . ." (citations omitted and emphasis added). *Id.* 314.

What information is required?

In *City of West Covina v. Perkins*, 525 U.S. 234, 242 (1999), the Court clarified its holding in *Memphis Light, Gas and Water Division v. Craft*, 436 U.S. 1 (1978), by directing that due process requires government not only to notify an individual of the government's intention to take action that will adversely affect the individual's property interests, but to also inform the individual of information that the government has in its possession if the information is relevant to the individual's defense of his property

interests and the individual could not reasonably be expected to acquire the information on his own.

In this case, the Department of the Interior mailed a Native American a written notice that the Department knew he could not read and in which the Department did not inform the Native American of his legal rights of which the Department was aware and about which the Department could not reasonably have expected the recipient of the notice, an illiterate Indian who lived in a remote Native village, to have acquired information on his own.

In this case the Department of the Interior's disregard of its fiduciary duty happened in 1930. But today the Department's repeated failure to act in a manner consistent with the fiduciary duty it owes to Native Americans that informs the right to due process remains a serious problem in Native villages in Alaska and on Indian reservations in the coterminous states.

Granting the petition will afford the Court an opportunity to instruct not only the Ninth Circuit, but the Department of the Interior, regarding the due process standard with which the Fifth Amendment requires the Department to comply when it deals with Native Americans who do not speak or read English very well and who the Department knows do not have reasonable access to information about their legal rights regarding their property interests. For

that reason, the Court should grant the petition and address the question presented.

## STATEMENT OF THE CASE

1a. In 1906 Congress enacted the Alaska Native Allotment Act (ANAA), Pub. L. No. 59-171, 34 Stat. 197 (1906) (codified prior to repeal at 43 U.S.C. §§ 270-1-270-3). The ANAA authorized the Secretary of the Interior

> to allot not to exceed one hundred and sixty acres of nonmineral land in the district of Alaska to any Indian or Eskimo of full or mixed blood who resides in and is a native of said district, and who is the head of a family, or is twenty-one years of age; and the land so allotted shall be deemed the homestead of the allottee and his heirs *in perpetuity*. . . . (emphasis added).

Between 1906 and 1971 when Congress repealed the ANAA, *see* 43 U.S.C. § 1617, Alaska Natives filed ANAA applications that requested the Secretary to issue certificates of allotment for approximately 16,000 parcels of public land.[3]

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[3] The following factual account is drawn from the administrative record, the answer the respondents filed in response to the petitioners' first amended complaint, and the statement of facts in the order of the District Court that the Ninth Circuit affirmed *See* App. 4-11. The lack of any factual dispute makes

(Continued on following page)

b. In 1916 Dick George filed ANAA Application No. F-480 to obtain a certificate of allotment for a 160-acre parcel of public land on the Yukon River that Mr. George and his family occupied as their place of residence. Because he was illiterate, Mr. George signed the application with his mark.[4]

c. On March 22, 1920 the First Assistant Secretary of the Interior approved ANAA Application No. F-480. The approval had the legal consequence of giving Dick George a vested property interest in the parcel of public land described in the application that the Secretary could not extinguish without affording Mr. George due process. *See Pence v. Kleppe*, 529 F.2d 135, 142 (9th Cir. 1976) ("An Alaska Native who meets the statutory requirements on land statutorily permitted to be allotted is entitled to an allotment of that land, and the Secretary [of the Interior] may not arbitrarily deny such an applicant. Due process does apply"). *Accord Anne Lynn Purdy Heirs of Arthur Purdy, Sr.*, 122 IBLA 209, 214 (1992) ("[T]he acceptance of a Native allotment claim has

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this case an ideal vehicle for addressing the important question presented

[4] Aware that most Alaska Natives were illiterate, in 1907 the Commissioner of the General Land Office (GLO), to whom the Secretary of the Interior had delegated responsibility for administrating the ANAA, directed "If the signature [on an ANAA application] is by mark, the same must be witnessed by two persons." Circular: Alaskan Lands – Allotments to Indians or Eskimos – Act of May 17, 1906, 35 Decisions of the Department of the Interior Relating to the Public Lands 437

generally been indicated by a written decision of the BLM approving the allotment. We find that this is the time when equitable title vests").

d. On April 28, 1920 the Assistant Commissioner of the GLO directed the Surveyor General to survey the parcel of public land described in ANAA Application No. F-480. If the Surveyor General then had done so, when the survey was completed the Secretary of the Interior would have issued Dick George a certificate of allotment and, as Congress directed in the ANAA, Mr. George and his heirs would have held title to the parcel "in perpetuity." But for reasons that the administrative record does not explain, the Surveyor General did not survey the parcel.

e. Four years after the First Assistant Secretary of the Interior approved ANAA Application No. F-480, in 1924 Dick George and his family relocated from the parcel of public land described in the application to Fort Yukon, a Native village on the Yukon River located upriver from the parcel.

f. Six more years later, in July 1930 the Ex-officio Register at the GLO office in Fairbanks, Alaska, mailed Dick George an envelope by registered mail. The envelope contained a letter dated June 20, 1930 from the Commissioner of the GLO to the Register & Receiver, App. 28, and a letter dated July 9, 1930 from the Ex-officio Register to Mr. George. App. 31. In his letter, the Commissioner of the GLO directed the Register & Receiver to inform Mr. George that, because he and his family no longer occupied

the parcel of public land described in ANAA Application No. F-480 as their place of residence, Mr. George had 60 days "to show cause why [his] application should not be rejected." In his letter, the Ex-officio Register so informed Mr. George. Because Mr. George had signed ANAA Application No. F-480 with his mark, the Ex-officio Register had actual knowledge that Mr. George could not read the letters that had been mailed to him. Of equal importance, in the answer they filed in response to the petitioners' first amended complaint, the respondents "admitted that the Department of the Interior has not interpreted the Alaska Native Allotment Act as requiring an allotment applicant to reside on the lands sought in an application after the allotment has been approved." But the letters the Ex-officio Register mailed to Mr. George did not inform Mr. George that he had a legal right to be issued a certificate of allotment for the parcel of public land described in ANAA Application No. F-480 even though Mr. George and his family no longer occupied the parcel as their place of residence.

g. When the Ex-officio Register received from the U.S. Postal Service the return receipt that had been attached to the envelope that he had mailed to Dick George by registered mail, the signatures on the receipt indicated that in Fort Yukon the envelope had been delivered, not to Mr. George as the regulations of the U.S. Postal Service required, but to Emil Bergman, the village postmaster. *See* App. 8.

h. On August 1, 1930 the Ex-officio Register received a letter dated July 21, 1930 that had been written by the hand that had signed it "Dick George." Because Mr. George had signed ANAA Application No. F-480 with his mark, the Ex-officio Register had actual knowledge that the letter could not have been written by Mr. George. In the letter, the individual who wrote it informed the Ex-officio Register that he was writing in response to the letter dated July 9, 1930 that the Ex-officio Register had mailed to Mr. George and that "I leave the place [i.e., the parcel of public land described in ANAA Application No. F-480] to you down there. . . ."[5]

i. The Department of the Interior treated the letter dated July 21, 1930 and signed "Dick George" as a relinquishment by Mr. George of ANAA Application No. F-480. In a letter dated September 25, 1930, the Commissioner of the GLO informed the Ex-officio Register that, as a consequence of the relinquishment, the First Assistant Secretary of the Interior's approval of ANAA No. F-480 "is hereby vacated and the application finally rejected in its entirety and the case closed effective upon notation hereof upon the records of your office." *See* App. 9.

2a. When the petitioners, who are the heirs of Dick George, discovered the facts set out above, on March 10, 2006 they filed with the Alaska State

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[5] The District Court reprinted the text of the letter in its Order. *See* App 8-9.

Director, BLM, a petition that requested the Director to reinstate ANAA Application No. F-480.[6] The petition informed the Director *inter alia* that even if in Fort Yukon Mr. George had received, and then had someone read him, the letters that the Ex-officio Register had mailed to him, and even if Mr. George then had dictated the letter signed "Dick George" that relinquished ANAA Application No. F-480, the relinquishment was void and of no legal effect because it had not been made by Mr. George with knowledge of his legal rights because the letters from the Commissioner of the GLO and the Ex-officio Register did not inform Mr. George that he had a legal right to be issued a certificate of allotment for the parcel of public land described in ANAA Application No. F-480 even though he and his family no longer occupied the parcel as their place of residence.

b. In a letter dated March 6, 2006, Krissel Crandell, Chief, Branch of Adjudication I, Alaska State Office, BLM, notified the petitioners that the Alaska State Director, BLM, had made a decision to deny their petition on the sole ground that

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[6] A petition for reinstatement is the appropriate procedural means to request BLM to reopen an ANAA application. *See Silas v. Babbitt*, 96 F 3d 355 (9th Cir 1996) (petition for reinstatement filed in 1986 requesting BLM to reinstate an ANAA application that BLM closed in 1972); *Olympic v United States*, 615 F. Supp. 990 (D Alaska 1985). *Accord Theodore Suckling (Heir of Chief Alexander)*, 121 IBLA 52 (1991) (BLM decision denying petition for reinstatement reversed); *Matilda Titus*, 92 IBLA 340 (1986) (BLM decision denying petition for reinstatement set aside and remanded).

A review of the case file indicates that all laws and procedures in place at the time of the application and decision thereon were appropriately followed and the decision of the Assistant Secretary on September 25, 1930 was and is valid. Therefore, Dick George's application was relinquished and properly closed on September 25, 1930.[7]

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[7] If it had not involved the reinstatement of an ANAA application, the State Director would have had administrative discretion to deny the petition by invoking the doctrine of administrative finality However, the State Director understood that invoking the doctrine would have violated the fiduciary duty that the Department of the Interior owes to the petitioners. For example, in *Heirs of Alexander Williams*, 121 IBLA 224 (1991), the Interior Board of Land Appeals (IBLA) reversed a 1989 decision of the State Director in which the Director had denied a petition for reinstatement of an ANAA application. The application had been filed in 1915 and approved in 1920, but the approval had been revoked erroneously in 1927 In so holding, the IBLA noted that in *Theodore Suckling (Heir of Chief Alexander)*, *supra* at 59 n 6, it had previously held that

> these [ANAA] cases represent an exception to the general rule under the doctrine of administrative finality, the administrative counterpart of res judicata, that a party is precluded from seeking reconsideration of a decision of an agency official when the party or his predecessor in interest had the opportunity to obtain review within the Department and took no action. The basis for this exception is found in the Secretary's special fiduciary responsibility to Native Americans, in this case, Native Alaskans, under which the Secretary and his delegates have a fiduciary duty to examine the circumstances of any purported relinquishment of a Native allotment (citations omitted).

121 IBLA at 231.

c. On August 28, 2007 the IBLA issued an order in which it affirmed the decision of the Alaska State Director.

d. On October 29, 2007 the petitioners sought review of the IBLA order in the U.S. District Court for the District of Alaska. On March 31, 2009 the District Court issued an order in which it affirmed the IBLA order on the ground that "the Plaintiffs [i.e., the petitioners] have failed to present credible evidence raising a factual issue related to due process and the 1930 rejection of [Dick] George's allotment application." App. 22.

e. On June 23, 2009 the petitioners sought review of the order of the U.S. District Court for the District of Alaska in the Ninth Circuit. On August 26, 2010 a panel of the Ninth Circuit issued a memorandum decision in which it affirmed the District Court on the ground that, as the District Court had held, "the Plaintiffs [i.e., the petitioners] have failed to present credible evidence raising a factual issue related to due process and the 1930 rejection of [Dick] George's allotment application." App. 1-2. On September 3, 2010 the petitioners petitioned the Ninth Circuit for rehearing *en banc*. The petition suggested that the panel's decision directly conflicted with the right to due process that this Court announced in *Memphis Light, Gas and Water Division v. Craft*, *supra*, and *City of West Covina v. Perkins*, *supra*. On October 20, 2010 the panel denied the petition. App. 27.

## REASONS FOR GRANTING THE WRIT

### I. THE QUESTION PRESENTED IS EXTRAORDINARILY IMPORTANT AND SHOULD BE DECIDED BY THIS COURT.

It is difficult to overstate the importance of this case. More than 247,000 Native Americans, an unknown but large number of whom live either in Native villages in Alaska or on Indian reservations in the coterminous states, do not speak English at home and outside the home they speak English less than "very well."

The Department of the Interior's failure to afford Dick George due process occurred some years ago. But the U.S. Court of Federal Claims recently awarded the heirs of Andrew Oenga, an Inupiat Eskimo from Alaska's North Slope, damages against the Department in excess of $5.3 million for the Department's breach of the fiduciary duty it owed to Mr. Oenga's heirs to properly enforce a lease agreement regarding a portion of Mr. Oenga's Alaska Native allotment. *See Oenga v. United States III*, 2010 WL 5160204 (Fed. Cl. Dec. 21, 2010). When read in their entirety, the *Oenga* decisions indicate that the Department's initial breach of the fiduciary duty it owed to Mr. Oenga and his heirs happened when it assisted Mr. Oenga, who the Department knew "spoke and read little or no English," *see Oenga v. United States I*, 83 Fed. Cl. 594, 599 n. 20 (2008), negotiate a lease agreement whose text had been written principally by attorneys employed by the oil company lessee.

The failure of the Department of the Interior to prevent Andrew Oenga and his heirs from being cheated – and there is no less inflammatory word for it – out of a significant portion of the value of Mr. Oenga's Alaska Native allotment demonstrates that the Department's dealings with Native Americans who speak and read English less than very well remains a problem of contemporary concern.

Consistent with that conclusion, on December 8, 2010 President Obama signed the Claims Resolution Act (CRA), Pub. L. No. 111-291, 124 Stat. 3064 (2010). Title I of the CRA approves the expenditure of $3.4 billion to settle *Cobell v. Salazar*, U.S. District Court for the District of Columbia No. 96-cv-1285, an action which alleged that the Department of the Interior had breached the fiduciary duty it owed to tens of thousands of Native Americans who, like Dick George, had presumed that the Department had been acting in their best interests.

Had the Department discharged its fiduciary duty in the manner required by law, Congress's enactment of title I of the CRA would not have been necessary.

In the memorandum decision that is the subject of this petition the Ninth Circuit informed the Department of the Interior that it has no Fifth Amendment duty to notify Native Americans of their legal rights before the Department takes agency action that may adversely affect their property interests in situations in which the Department has actual

knowledge that the Native Americans cannot reasonably be expected to educate themselves about their legal rights.

Of the nine states within the Ninth Circuit, the seven coterminous states contain more than one hundred Indian reservations, including the Navajo and Hopi reservations in Arizona on which more than 180,000 Native Americans reside. And in Alaska more than 60,000 Indians, Eskimos, and Aleuts reside in Native villages. An unknown, but significant, number of those individuals are traditional people who the Department knows do not have adequate English language skills and are not knowledgeable about their legal rights regarding their property interests. Granting this petition will afford the Court an opportunity to correct the Ninth Circuit's error regarding what process the Due Process Clause requires the Department of the Interior to provide to those individuals.

## II. THE NINTH CIRCUIT DECISION CONFLICTS WITH PRECEDENTS OF THIS COURT AND THE INTERIOR BOARD OF LAND APPEALS.

### A. PRECEDENTS OF THIS COURT.

In *Tulsa Professional Collection Services v. Pope*, 485 U.S. 478, 484 (1988), the Court announced the blackletter rule that, for the purpose of satisfying the right to due process, "whether a particular method of notice is reasonable depends on the particular circumstances." So, for example, a written notice mailed

to an addressee's home violated due process when the state that mailed it had actual knowledge that the addressee had been incarcerated. *See Robinson v. Hanrahan*, 409 U.S. 38 (1972). And written notice mailed to an individual violated the right to due process when the local government that mailed it had actual knowledge that the individual was an "incompetent" who was "without mental capacity to handle her affairs or to understand the meaning of any notice served on her." *See Covey v. Town of Somers*, 351 U.S. 141, 146 (1956). *And see also c.f., Wolff v. McDonnell*, 418 U.S. 539, 570 (1974) (when the state had actual knowledge that an inmate to whom it had given written notice of a violation of prison regulations was illiterate the Due Process Clause of the Fourteenth Amendment required the state to give the inmate "aid in the form of help from the staff or from a sufficiently competent inmate designated by the staff").

With respect to Dick George's incompetency, the record in this case is uncontroverted: the Ex-Officio Register in 1930 and the Alaska State Director, BLM, in 2006 had actual knowledge that Dick George was illiterate and, as a consequence, could not have read the letters that notified him that the Commissioner of the GLO intended to vacate the Department of the Interior's approval of ANAA Application No. F-480. And the Ex-officio Register and the State Director had actual knowledge that Mr. George could not have written the letter dated July 21, 1930 in which the

individual who signed the letter "Dick George" purported to relinquish ANAA Application No. F-480.[8]

Nevertheless, the Ninth Circuit concluded that the Department of the Interior did not violate the Due Process Clause when it mailed Mr. George a written notice that it had actual knowledge that he could not read and that, based on the signatures on the return receipt, there was no evidence he received, and then accepted as a relinquishment of ANAA Application No. F-480 a letter that the Department had actual knowledge that Mr. George could not have written.

But even assuming the Ninth Circuit's best case, which is that Mr. George received, and then had someone read him, the letters that the Ex-officio Register mailed to him, and then dictated the letter signed "Dick George," the record in this case is uncontroverted that neither of the letters the Ex-officio Register mailed to him informed Mr. George that he had a legal right to be issued a certificate of allotment for the parcel of public land described in ANAA Application No. F-480 even though Mr. George and his

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[8] With respect to the knowledge of the State Director, in addition to ANAA Application No. F-480, which Dick George had signed with his mark, the petitioners attached to their petition for reinstatement a copy of the 1930 U S. Census at Fort Yukon which states that Mr George could not read or write English, and the affidavit of Mr. George's daughter, petitioner Grace Henzler, in which Mrs. Henzler informed the State Director that "at the time of his death my father could not read or write the English language."

family no longer occupied the parcel as their place of residence.[9]

In *Memphis Light, Gas and Water Division v. Craft*, *supra*, MLG&WD provided a notice to its customers regarding its intention to terminate utility service for nonpayment that did not inform the customers of the procedure available to them for contesting the accuracy of their utility bills prior to the termination. The Court held that the failure of the notice to provide that information violated the Due Process Clause of the Fourteenth Amendment because the notice

> was not "reasonably calculated" to inform them of the availability of "an opportunity to present their objections" to their bills. The purpose of notice under the Due Process Clause is to apprise the affected individual of, and permit adequate preparation for, an impending "hearing." Notice of a case of this

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[9] Demonstrating that the paternalism that has too often characterized the Department of the Interior's dealings with Native Americans remains a contemporary problem, when the petitioners identified to the Ninth Circuit that defect in the notice that the Ex-officio Register gave to Dick George, the respondents' response was to suggest that "it is not apparent why advising him [i.e., Mr. George] that he should receive a certificate of allotment on the original tract would have been in his best interests." *Defendants-Appellees' Answering Brief*, at 33. Whether receiving a certificate of allotment would have been "in his best interests" was a question the Department had a fiduciary duty to allow Mr. George to decide for himself after the Department had informed him of his legal rights.

> kind does not comport with constitutional requirements when it does not advise the customer of the availability of a procedure for protesting a proposed termination of utility service as unjustified. (citation omitted).

436 U.S. at 14-15.

In *City of West Covina v. Perkins*, *supra*, the Court clarified its holding in *Memphis Light*. In *West Covina*, the Court considered whether the Due Process Clause requires states and municipal governments "to give detailed and specific instructions or advice to owners who seek return of property lawfully seized but no longer needed for police investigation or criminal prosecution." 525 U.S. at 236. The Court concluded that the Due Process Clause does not require a notice to contain that information. In so holding, the Court clarified its holding in *Memphis Light* as follows:

> In requiring notice of the administrative procedures [employed to contest a utility bill] . . . we relied not on any general principle that the government must provide notice of the procedures for protecting one's property interests but of the fact that the administrative procedures at issue were not described in any *publicly available* document. A customer who was informed that the utility planned to terminate his service *could not reasonably be expected to educate himself* about the procedures available to protect his interests . . . While *Memphis Light* demonstrates that notice of the procedures for protecting one's property interests may be

> required when those procedures are *arcane* and are not set forth in documents *accessible to the public*, it does not support a general rule that notice of remedies and procedures is required. (emphases added).

525 U.S. at 242.

Even if he had been able to read and write English, in 1930 in Fort Yukon, Alaska, how could Dick George have reasonably been expected to educate himself regarding the fact that, once the Department of the Interior approved an ANAA application, the applicant had a legal right to be issued a certificate of allotment for the parcel of public land described in the application even if, subsequent to the approval, the applicant no longer occupied the parcel as his place of residence? That information involved an arcane – but extremely consequential – point of public land law. And no document available to Mr. George and other members of the public in Fort Yukon contained that information. Nevertheless, the Ninth Circuit concluded that the notice Mr. George was given comported with the Due Process Clause. That conclusion so far departed from the due process standard this Court announced in *Memphis Light* and clarified in *West Covina* as to call for an exercise of the Court's supervisory power.

In the latter regard, *BMW of North America, Inc. v. Gore*, 517 U.S. 559 (1996), and *State Farm Mutual Automobile Insurance Co. v. Campbell*, 538 U.S. 408 (2003), are instructive.

In *Gore*, the Court identified three factors that the Due Process Clause requires lower courts to weigh when they review punitive damage awards. Six years later the Court granted the petition for a writ of certiorari in *Campbell*. *See* 535 U.S. 1111 (2002). The Court did so because, even though the dispute between the parties in *Campbell* was "neither close nor difficult," *see* 538 U.S. at 418, the Court concluded that the lower courts would benefit from additional guidance regarding how the *Gore* factors should be weighed.

That is the situation here.

The Court's holding in *Memphis Light*, as clarified by its holding in *West Covina*, is clear: before it extinguishes a property right the Due Process Clause requires government to give the property owner notice of the extinguishment and requires the notice to contain information relevant to the owner's defense of his property right if that information is not publicly available and if the owner cannot reasonably be expected to educate himself about the information on his own. But the Court has not given the lower courts and the Department of the Interior guidance regarding how they should apply that constitutional principle when the owner of the property right that may be extinguished is a Native American who speaks and reads English less than very well, and to whom, as the Court noted in *Seminole Nation v. United States*, *supra* at 297, the Department has a "moral obligation[ ] of the highest responsibility and trust" and a

nondiscretionary duty to conform its conduct to "the most exacting fiduciary standards."

Granting the petition and addressing the question presented will enable the Court to give that important guidance.

### B. PRECEDENTS OF THE INTERIOR BOARD OF LAND APPEALS.

The Secretary of the Interior established the IBLA to review decisions of officers of the BLM. *See* 43 C.F.R. § 4.410(a).

With respect to decisions that relate to the administration of the ANAA, the IBLA has repeatedly held that the "Secretary of the Interior and his delegates are properly considered to be under a fiduciary duty to examine the circumstances of any purported relinquishment by a[n Alaska] Native allotment applicant and ascertain whether it was *knowing* and voluntary." (emphasis added). *Heirs of William A. Lisbourne*, 97 IBLA 342, 344 (1987). *Accord Matilda Titus*, *supra* at 351, Administrative Judge Grant concurring that

> The duty to reexamine the circumstances of relinquishment . . . must be predicated on the Secretary's special fiduciary responsibility to Native Americans, in this case Native Alaskans . . . The Secretary of the Interior and his delegates are properly considered to be under a fiduciary duty to examine the circumstances of any purported relinquishment

> by a Native allotment applicant and ascertain whether it is *knowing* and voluntary. (emphasis added).

*And see also Heir of Frank Hobson*, 117 IBLA 368, 371 (1991), reaffirming that

> In *Matilda Titus*, the concurring opinion outlined the procedure to be followed where the BLM receives an application for reinstatement of a previously relinquished Native allotment application:
>
> BLM has an obligation to investigate the circumstances of that relinquishment to determine whether reinstatement of the application is warranted. The investigation should include a determination of whether relinquishment was *knowing* and voluntary and whether the conditions for an allotment have been met. Thus, if BLM concludes that, but for the relinquishment, the application would have been approved, it should reinstate the application and pursue recovery of the land. (emphasis added and citation omitted).

The IBLA has further recognized that in order for an Alaska Native to "knowingly" relinquish his ANAA application, the relinquishment must be made "*with knowledge of the applicant's allotment rights* and the consequences of the relinquishment." (emphasis added). *Estate of Willie Arkanakyak*, 137 IBLA 58, 60-61 (1996). But how could Dick George or any other ANAA applicant similarly situated in a remote Native village obtain "knowledge of [his] allotment rights"

unless, as *Memphis Light* and *West Covina* instruct that the Due Process Clause requires, the GLO or the BLM inform the applicant what those rights are? The record in this case is uncontroverted that the Ex-officio Register did not do so in the notice he mailed to Mr. George. *See* App. 28-31.

## CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted.

Respectfully submitted,

DONALD CRAIG MITCHELL

*Counsel for Petitioners*

**NOT FOR PUBLICATION**

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

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| GRACE HENZLER; et al.,<br>Plaintiffs-Appellants.<br>v.<br>KEN SALAZAR, in his official capacity as Secretary of the Interior; et al.,<br>Defendants-Appellees. | No. 09-35597<br>D.C. No. 3:07-cv-00220-TMB<br>MEMORANDUM*<br>(Filed Aug. 26, 2010) |

Appeal from the United States District Court
for the District of Alaska
Timothy M. Burgess, District Judge, Presiding

Argued and Submitted July 26, 2010
Anchorage, Alaska

Before: SCHROEDER, O'SCANNLAIN and CLIFTON, Circuit Judges.

Grace Henzler and other heirs of Dick George ("Henzler") appeal the district court's summary judgment in favor of the Secretary of the Interior. Based on its detailed review of the record, the district court found that "the Plaintiffs have failed to present credible evidence raising a factual issue related to

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* This disposition is not appropriate for publication and is not precedent except as provided by Ninth Circuit Rule 36-3

due process and the 1930 rejection of George's allotment application. The record establishes that the minimum requirements outlined in *Pence v. Kleppe* were met at the time the GLO closed George's file." We agree. Accordingly, we affirm.

This Court defers to an agency's reasonable interpretation of its regulations. *Martin v. Occupational Safety & Health Review Comm'n*, 499 U.S. 144, 150 (1991). Under its reasonable interpretation of 43 C.F.R. pt. 4, the Interior Board of Land Appeals generally does not have authority to overrule a decision that was approved by an Assistant Secretary. *Blue Star, Inc.*, 41 I.B.L.A. 333, 335 (1979). The Secretary is required, however, to provide procedural due process to qualifying Alaska Native Allotment Applicants. *Pence v. Kleppe*, 529 F.2d 135, 142 (9th Cir. 1976). In cases involving a colorable claim that an applicant was denied procedural due process, the IBLA can and has overruled decisions even though approved by an Assistant Secretary. *See, e.g., Heirs of Alexander Williams*, 121 I.B.L.A. 224 (1991); *Ellen Frank*, 124 I.B.L.A. 349 (1992). By failing to present credible evidence raising a factual issue related to due process, Henzler failed to establish a colorable claim that Dick George was denied procedural due process.

**AFFIRMED.**

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ALASKA

| | |
|---|---|
| GRACE HENZLER, et al.<br>Plaintiffs,<br>vs.<br>DIRK KEMPTHORNE, in his official capacity as Secretary of the Interior, et al.,<br>Defendants. | Case No.<br>3:07-cv-0220 TMB<br>ORDER<br>Re: Plaintiffs' Motion for Summary Judgment |

## I. MOTION PRESENTED

Grace Henzler and other heirs of Dick George bring this action challenging a denial by the Alaska State Office of the federal Bureau of Land Management ("BLM") of their petition to reinstatement Alaska [sic] Native Allotment Application No. F-0480. They seek a declaratory judgment and injunctive relief in the form of a court holder setting aside the BLM's action and directing the agency to grant their petition for reinstatement and issue a certificate allotment for the tract in question. The government has filed an opposition,[1] and the Court heard oral argument from the parties on November 3, 2008.

[1] Under Local Rule 16.3(c)(2), governing administrative agency appeals, a Defendant's principal brief in opposition is deemed a cross-motion for summary judgment.

## II. BACKGROUND

On August 21, 1916, Dick George, an Athabascan Indian, filed an application for a 160-acre allotment of land under the Alaska Native Allotment Act ("ANAA") of 1906.[2] As originally enacted, the ANAA provided:

> That the Secretary of the Interior is hereby authorized and empowered . . . to allot not to exceed one hundred and sixty acres of non-mineral land in the district of Alaska to any Indian or Eskimo of full or mixed blood who resides in and is a native of said district, and who is head of a family, or is twenty-one years of age; and the land so allotted shall be deemed the homestead of the allottee and his heirs in perpetuity, and shall be inalienable and nontaxable until provided by Congress. Any person qualified for an allotment as aforesaid shall have the preference right to secure by allotment the nonmineral land occupied by him not exceeding one hundred and sixty acres.

George's application, later denominated F-0480, sought the allotment on unsurveyed lands along the Yukon River two miles above the Ray River.[3]

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[2] 34 Stat. 197, *amended by* 70 Stat 954 (1956) (former 43 U.S.C. §§ 270-1 to 270-3). The ANAA was repealed in 1971 by section 18(a) of the Alaska Native Claims Settlement Act, 43 U.S C. § 1617(a) (1994), with a savings clause for applications pending on December 18, 1971.

[3] AR 004.

George had lived on this tract since April 1, 1915 with his wife and three children.[4] He had built a cabin and a storage cache, cleared three acres of land, and raised a garden each year.[5] Filed with the U.S. Land Office in Fairbanks, the application gave the following description of the land's location:

> Included in claim where Stake No. 1 is on the R.L. Yukon River two miles above Ray River. Thence 2640 feet up stream to Stake No. 2, thence 2640 feet N to Stake No. 3, thence 2640 Ft. W to Stake No. 4, thence 2640 ft. S. to Stake No. 1, the place of beginning. All corners posted and lines blazed.[6]

George signed the application with a mark, rather than a signature.[7] As required by the General Land Office ("GLO"), George also filed a corroborative affidavit signed by two witnesses.[8]

In 1919, the schools superintendent for the Upper Yukon, at the direction of the GLO, conducted a field investigation of the land described in George's application and recommended that the application be approved and a certificate of allotment issued. The superintendent described the tract as "an excellent home site" as well as "good agricultural land" and a

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[4] AR 194.

[5] *Id*

[6] AR 195, 309

[7] *Id.*

[8] AR 196

"good salmon fishing ground."[9] The chief of the Alaskan field division of the GLO agreed, and forwarded the superintendent's report to the Commissioner of the GLO.[10] The Commissioner concurred and, on March 16, 1920, forwarded the superintendent's recommendation to the Secretary of the Interior.[11] On March 22, 1920, the First Assistant Secretary of the Interior approved George's application and requested a survey of the allotment,[12] which led the Assistant Commissioner of the GLO to direct the Alaska office of the U.S. Surveyor General to "prepare special instructions for the survey of a tract of land claimed by Dick George, a native living at the Village of Stevens, Alaska."[13] But the land in question was never surveyed, and because of this the GLO never issued to George a certificate of allotment.[14]

In 1924, George and his family moved to Fort Yukon, roughly 230 miles from the allotment he had sought.[15] Two years later, the GLO commissioner

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[9] AR 194

[10] AR 201.

[11] *Id.*

[12] The administrative record does not contain a copy of the actual approval. However, pursuant to the procedures in place in 1920, special survey instructions were issued only after an allotment application had been approved by the Secretary of the Interior Dkt 24, Defs.' Answer to First Am. Compl , Ex. 3.

[13] AR 200.

[14] Dkt 15, Defs.' Am Answer ¶ 31

[15] AR 206.

directed its Alaskan Field Division to reexamine 46 Alaska Native allotment applications, including George's, that had been filed with the Fairbanks office.[16] In 1929, the GLO sent H.K. Carlisle, a mineral examiner employed by the GLO, to conduct a new field investigation of the land described in George's application. In a report to the GLO commissioner, Carlisle wrote that George "states that he intends to make his home at Fort Yukon, and does not intend to make further use of the tract applied for."[17] Carlisle added: "The improvements are going to pieces, for the reason that they have not been used for five years."[18] Given this, he recommended that "the application be held for rejection and the case closed."[19]

The GLO commissioner accepted Carlisle's recommendation, and in a June 20, 1930 letter, directed the U.S. Land Office in Fairbanks to notify George that he had 60 days, from the date he received the notification, to show cause why his allotment application should not be rejected, or to file an application for other lands.[20] On July 9, 1930, the Register of the Fairbanks office sent George the commissioner's letter and a separate letter stating:

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[16] AR 204-05.

[17] AR 207

[18] *Id.*

[19] *Id.*

[20] AR 208.

> You will be allowed 60 days from the receipt of this notice in which to protest against the cancellation of your allotment application in case you desire to hold the tract. If you do not want to hold the tract no action is necessary and your application will be rejected after 60 days.[21]

The letters were sent together by registered mail, return receipt requested. The return receipt showed the date of delivery at July 21, 1930; it was signed with the names "Dick George" and "Emil Bergman" (on the line reserved for the addressee's agent).[22] At the time, Bergman was the postmaster in Fort Yukon.[23] On August 1, 1930, the Fairbanks office received a handwritten letter dated July 21, 1930 and purportedly signed by Dick George. It stated:

> Dear Sir:
>
> Thanking you for receiving your interesting letter about the land I was intending to stay in Fort Yukon now I now figure to stay in Fort Yukon for my home stead so I leave the place to you down there I would like to have a lot here instead of down there let me know of everything wishing to get a lot for home stead in Fort Yukon so let me know right away. I am going away 15th of August so if you let me know I do it next

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[21] AR 210

[22] AR 211; *see also* Dkt 24, Defs' Am. Answer ¶ 37

[23] *Id.*

> summer. I will be coming back 10th of June next year 1931. I will be here so the wood man will let me know and show me. Close now with best regards.
>
> Your truelly (sic) friend
>
> Dick George[24]

On August 21, 1930, the Register in the Fairbanks office mailed the GLO commissioner a copy of the handwritten letter, the return receipt with the names of "Dick George" and "Emil Bergman," and a letter telling the commissioner that George had been notified that his application would be cancelled and he could select another tract at his convenience.[25] The letter further stated: "It would now appear that the way is clear to close out 0480 without further notice to the applicant."[26]

In response, the GLO commissioner wrote to the Register on September 25, 1930 stating that:

> [D]epartmental approval of application 0480 is hereby vacated and the application finally rejected in its entirety and the case closed effective upon notation thereof upon the records of your office. You will advise the Indian and the proper Superintendent, Office of Education hereof.[27]

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[24] AR 215.

[25] AR 218.

[26] *Id.*

[27] AR 219

At the bottom of the commissioner's letter, a signature indicates that, on September 25, 1930, Assistant Secretary John H. Edwards approved the decision to vacate the prior approval of George's allotment application.[28] Dick George died intestate in 1950 in Fort Yukon.[29]

On January 3, 2005, Grace Henzler and other individuals identifying themselves as the heirs of Dick George filed a petition with the BLM's Alaska State Office asking it to reinstate George's allotment application and to approve it pursuant to section 905 of the Alaska National Interest Lands Conservation Act, 43 U.S.C. 1634.[30] On March 6, 2006, Krissell Crandall, chief of the branch of adjudication in BLM's Alaska State Office, wrote to the Plaintiffs, rejected their application. Her letter states:

> A review of the case file indicates that all laws and procedures in place at the time of the application and decision thereon were appropriately followed and the decision of the Assistant Secretary on September 25, 1930 was and is valid. Therefore, Dick George's application was relinquished and properly closed on September 25, 1930. The Bureau of Land Management will be taking no action on this matter.[31]

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[28] AR 221.

[29] AR 224.

[30] AR 162-225

[31] AR 158.

The Plaintiffs then appealed BLM's determination to the Department of the Interior's Board of Land Appeals ("IBLA"). The IBLA held that since the decision to vacate the prior approval had been approved by an assistant secretary, both BLM and the IBLA lacked authority to review and reverse it. Accordingly, the IBLA affirmed the BLM's decision not to reopen the case.[32] The Plaintiffs then filed this suit in federal district court on October 29, 2007.

## III. LEGAL STANDARD

A federal district court may reverse the IBLA if the IBLA's decision is arbitrary, capricious, not supported by substantial evidence, or contrary to law.[33] To make such a determination, the court must consider "whether the decision was based on a consideration of the relevant factors and whether there has been a clear error of judgment. . . . Although the inquiry into the facts is to be searching and careful, the ultimate standard of review is a narrow one."[34]

## IV. DISCUSSION

### A. Final Agency Action

As a preliminary matter, the Court concludes that the IBLA decision dated August 28, 2007 is the

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[32] AR 004-007.

[33] *Hjelvik v Babbitt*, 198 F.3d 1072, 1074 (9th Cir 1999)

[34] *Citizens to Preserve Overton Park, Inc. v. Volpe*, 401 U.S. 402, 416 (1971).

appropriate "final agency action" subject to judicial review. The Plaintiffs argue that the Court should, instead, review the March 6, 2006 letter from Krissell Crandall, chief of the Branch of Adjudication I of the BLM, stating that the BLM would take no action on the Plaintiffs' petition for reinstatement of Dick George's application for Alaska Native allotment F-0480.[35] Crandall's letter further stated that: "[A]ll laws and procedures in place at the time of the application and decision thereon were appropriately followed and the decision of the Assistant Secretary on September 25, 1930 was and is valid."[36] The Defendants disagree, arguing that the Court should review the IBLA opinion.

Neither the ANAA nor the APA specifically define what constitutes a "final agency action" for judicial review. In *Bennett v. Spear*, the United States Supreme Court identified two conditions that must be satisfied for an agency action to be considered "final."[37] First, the action must mark the consummation of the agency's decision making process, rather than a tentative or interlocutory decision. Second, the [sic] "the action must be one by which rights or obligations have been determined," or from which 'legal consequences will flow.'"[38] The Ninth Circuit has

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[35] AR 158.

[36] *Id.*

[37] 520 U.S 154, 177-78 (1997)

[38] *Id.*

further identified certain factors that indicate finality. These include: "whether the [action] amounts to a definitive statement of the agency's position, whether the [action] has a direct and immediate effect on the day-to-day operations of the party seeking review, and whether immediate compliance [with the terms] is expected."[39]

The Plaintiffs do not cite any legal authority, or respond to the authority offered by the Defendants, for their position that the March 6, 2006 BLM letter was a final agency action. In arguing that the IBLA decision was the final agency action, the Defendants point to Interior Department regulations relating to appeals and the finality of decisions. Specifically, 43 C.F.R. § 4.1 provides:

> The Office of Hearings and Appeals . . . is an authorized representative of the Secretary for the purpose of hearing, considering and determining, *as fully and finally as might the Secretary*, matters within the jurisdiction of the Department involving hearings, and appeals, and other review functions of the Secretary. Principal components of the Office Include:
>
> (3) Board of Land Appeals. The Board decides *finally* for the Department appeals to the head of the Department from decisions

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[39] *Industrial Customers of Northwest Utilities v Bonneville Power Admin.*, 408 F.3d 638, 646 (9th Cir. 2005).

> rendered by Departmental officials rendered by Departmental officials relating to: (I) The use and disposition of public lands and their resources . . .
>
> In addition, 43 C.F.R. § 4.21(1) provides:
>
> (c) Exhaustion of administrative remedies. *No decision which at the time of its rendition is subject to appeal to . . . an Appeals Board shall be considered final so as to be agency action subject to judicial review under 5 U.S.C. § 704*, unless a petition for a stay of decision has been timely filed and the decision being appealed has been made effective . . . or a decision has been made effective pending appeal . . .
>
> (d) Finality of decision. No further appeal will lie in the Department from a decision of . . . an Appeals Board of the Office of Hearings and Appeals . . .

These regulations support the Defendants' position. The regulations, particularly 43 C.F.R. § 4.21(1), make clear that the BLM's decision was not a final agency action, because it was subject to appeal to the IBLA – and an appeal was taken. Therefore, it cannot be taken as a "definitive statement of the agency's position." Similarly, the BLM's decision did not have a "direct and immediate effect" on the Plaintiffs, nor require immediate compliance, because the Interior Department regulations essentially stay such decisions during the appeal period.

### B. The IBLA Decision

The IBLA order affirmed the BLM's decision to take no action on the Plaintiffs' petition for reinstatement on the ground that both the BLM and the IBLA lacked authority to reverse the GLO's 1930 decision vacating the earlier approval of George's allotment application. The IBLA based this determination on the fact that the 1930 rejection had been approved by Assistant Secretary John H. Edwards. The IBLA order states: "To grant appellants' Petition would necessarily require BLM to reverse a decision of an Assistant Secretary, an action beyond its authority." The order cites 43 C.F.R. 4.410(a), which provides: "Any party to a case who is adversely affected by a decision of an officer of the Bureau of Land Management . . . shall have a right to appeal to the Board, except – . . . [w]here a decision has been approved by the Secretary." The IBLA order then quotes from an earlier IBLA opinion in *Blue Star, Inc.*, which explains that the IBLA (through the Office of Hearings and Appeals) had been delegated the full authority of the Interior Secretary – as have the Assistant Secretaries. The *Blue Star* opinion explains:

> It follows that it was not contemplated that one officer who commands all of the authority of the Secretary should employ that authority to invade the province of another such officer who is not under his direct supervision. Thus, where an Assistant Secretary has made a decision or, prior to the filing of an appeal, has approved a decision made by a subordinate, that decision may not be

> reviewed in the Office of Hearings and Appeals since the full authority of the Secretary would have been exercised.[40]

The Court concurs with the IBLA that, as a general rule, both the IBLA and BLM lack authority to overrule a decision of an Assistant Secretary. However, the Ninth Circuit has held that the Interior Secretary's adjudication of allotment applications must comport with due process.[41] That is, the court recognized that applicants for Native allotments have a sufficient property interest to be entitled to procedural due process protection under the U.S. Constitution. In *Pence v. Kleppe*, the Ninth Circuit declared that:

> Congress intended to create or to recognize rights in Alaska Natives to the land that they occupy for the statutory period, and not, as the Secretary contends, merely a hope that the government will give them the land. An Alaska Native who meets the statutory requirements on land statutorily permitted to be allotted is entitled to an allotment of that land, and the Secretary may not arbitrarily deny such an applicant. Due process does apply.[42]

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[40] *Blue Star, Inc.*, 41 IBLA 333 (1979).

[41] *Silas v. Babbitt*, 96 F.3d 355, 357 (9th Cir. 1996) (citing *Pence v. Kleppe*, 529 F.2d 135 (9th Cir 1976).

[42] *Pence*, 529 F.2d at 141-42

As to the specific requirements of due process, the court stated that "procedures must be provided to the extent that the benefit of avoiding unwarranted rejections of allotment applications is not outweighed by the administrative burden on the government."[43] At a minimum:

> applicants whose claims are to be rejected must be notified of the specific reasons for the proposed rejection, allowed to submit written evidence to the contrary, and, if they request, granted an opportunity for an oral hearing before the trier of fact where evidence and testimony of favorable witnesses may be submitted before a decision is reached to reject an application for an allotment. Beyond this bare minimum, it is difficult to determine exactly what procedures would best meet the requirements of due process. The specific problems involved and the demands placed upon the Bureau of Land Management are best judged initially by the Secretary.[44]

Following *Pence* and its progeny, the IBLA has approved the reinstatement of applications – which were previously rejected under the authority of an Assistant Secretary – after a reexamination of the record failed to show that the minimal requirements

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[43] *Id* at 142.

[44] *Id.* at 143.

of due process were not met.[45] As the IBLA stated in *Heirs of George Brown*:

> what *Pence* required and what section 905(a) of ANILCA authorized was the Departmental reexamination of those past cases in which an allotment application had been rejected with finality to determine whether or not due process was afforded the applicant and the reinstatement fo [sic] those applications where either the minimum requirements of due process, as delineated by the court in *Pence v. Kleppe*, . . . where not met or where a manifest injustice would occur were the application not to be reinstated.[46]

Here, the Plaintiffs have not explicitly argued that George's procedural due process rights were violated. Nor did the IBLA address due process in its opinion affirming the BLM's rejection of the Plaintiffs' petition. But the Plaintiffs' briefing implies that George did not receive proper notice of the government's proposed rejection of his allotment application or of its final rejection, did not write the July 21, 1930 letter purporting to relinquish his allotment application, and was not fully informed of his rights to an allotment as an Alaska Native.[47] The Court interprets these arguments as raising procedural due process

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[45] *See, e.g., Heirs of Alexander William et al.*, 121 IBLA 224 (1991).

[46] *Heirs of George Brown*, 143 IBLA 221, 229 (1998)

[47] Dkt. 27, Pls.' Mot. for Summ. J 18-22.

concerns under *Pence v. Kleppe*, and thus examines whether a genuine issue of material fact exists as to due process.[48]

With regard to notice, the Plaintiffs point out an inconsistency in the record related to the return receipt for the letters from the GLO commissioner and Fairbanks office mailed on July 9, 1930, which stated that he had 60 days from the receipt of the letters to protest the proposed cancellation of his allotment. They note that although the return receipt was signed by "Emil Bergman" as an agent for George, a letter dated September 25, 1930 from the GLO commissioner to the register in Fairbanks stated that George had "signed" the return receipt dated July 21, 1930.[49]

The Plaintiffs also contend that the GLO commissioner had "actual knowledge" that George was illiterate and could not have signed the return receipt or, at the very least, knew that a high percentage of Alaska Natives were illiterate at the time. Given this, the Plaintiffs imply that the return receipt raises a factual issue as to whether George received adequate notice of the proposed rejection. In addition, they note

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[48] *See also Heirs of Alexander William et al.*, 121 IBLA 224 (1991) (reversing decision by BLM – and approved by Assistant Secretary – not to reinstate two allotment applications where the record failed to show whether notice was given to two applicants of the decision to revoke the prior approvals and giving them 90 days to protest.)

[49] AR 220.

that the record contains no evidence that George received the August 6, 1930 letter from the Register in Fairbanks acknowledging receipt of the hand-written letter stating that George had moved to Fort Yukon and purporting to relinquish his allotment along the Yukon River.[50] They further note that the record contains no evidence that the GLO ever sent George notice of the final cancellation and closing of his allotment application.[51] Finally, the Plaintiffs argue that even if George did write the July 21, 1930 letter indicating his intent to give up the F-0480 allotment, it was not a valid relinquishment because the government failed to inform George that he had a right to the allotment even though he had moved to Fort Yukon.

The government responds that the record shows that George was given adequate notice and an opportunity to be heard, and therefore the requirements of procedural due process were satisfied. First, they point to the letters from the GLO commissioner and Register in Fairbanks informing him of the proposed cancellation of his allotment application, and the 60-day deadline for opposing it.[52] Second, they note that the record shows George actually received the package with these letters, based on the return receipt signed by Bergman, the Yukon postmaster, for

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[50] *See* Dkt 15, Defs ' Am Answer ¶ 39.

[51] AR 222; *see* Dkt 15, Defs.' Am Answer ¶ 41.

[52] AR 288, 292-93

George.[53] In connection with this, they argue that given the elapse of time, the Court should apply a judicially recognized presumption that in the absence of clear evidence to the contrary, government officials are presumed to have properly performed their duties.[54] Third, the government contends that George was not entitled to a hearing before the closing of his allotment application because he did not submit evidence raising a factual issue. Fourth, for the reasons already stated, the government argues due process requirements were met, regardless of whether the handwritten letter purportedly from George was authorized by him or accurately stated his views. Finally, the government asserts that beyond procedural due process, the record fails to show that the GLO's 1930 rejection of his application constituted an injustice, based on the information available to the agency at the time. In support of this, the government points to the November 5, 1929 report of GLO Examiner H.K. Carlisle, who reported that George had moved to Fort Yukon five years earlier and did not intend to make further use of the tract applied for in

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[53] AR 287-88.

[54] *See U.S v Chem Foundation*, 272 U.S 1, 14-15 (1926) ("The presumption of regularity supports the official acts of public officers, and, in the absence of clear evidence to the contrary, courts presume that they have properly discharged their official duties") (citations omitted); *U.S v Mobley*, 474 F.2d 614 (9th Cir. 1973) ("It is the settled general rule that all necessary prerequisites to the validity of official action are presumed to have been complied with, and that where the contrary is asserted it must be affirmatively shown.")

1916. Carlisle also reported that the improvements on the land, including a log cabin, smokehouse, and storage cache had fallen into disrepair from lack of use.[55] The government sees this as corroborating the July 21, 1930 handwritten letter purportedly from George. The government also points out that the rejection of George's application in 1930 was actually a benefit to him – assuming he intended to claim another allotment near Fort Yukon. Prior to its amendment in 1956, the ANAA was understood to authorize the grant of only a single allotment not to exceed 160 acres.[56] Therefore, the government asserts, if George had truly desired an allotment in Fort Yukon, he first needed to reject and close his 1916 application.

The Court finds that the Plaintiffs have failed to present credible evidence raising a factual issue related to due process and the 1930 rejection of George's allotment application. The record establishes that the minimum requirements outlined in *Pence v. Kleppe* were met at the time the GLO closed George's file. In particular, the record shows that George was notified of the specific reason for the GLO's proposed rejection of his application through the letters from the GLO commissioner and the Register in Fairbanks. As noted above, the commissioner's letter, apparently relying on Carlisle's report, stated that

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[55] AR 301-02

[56] Dkt 29, Defs' Resp Br at 18

the rejection was based on the condition of the structures on the land and George's reported intention to make his home in Fort Yukon and give up the tract identified in application F-0480. In addition, George was given the opportunity to submit written evidence against the proposed cancellation. Both the commissioner's letter and the register's letter clearly stated that George had 60 days from receipt of the letters to "show cause why the application should not be rejected" or "protest against the cancellation of [the] allotment application."[57] Despite suggestions that George did not receive the letters and that some type of chicanery occurred, the Plaintiffs have produced no credible evidence supporting an inference that the notices of the proposed allotment rejection went astray. This is especially true since the government is relying on proof of receipt, rather than proof of mailing. As the district court stated in *Lord v. Babbitt*, "[w]hile certified mail may not be a foolproof method, it was one of the most reliable alternatives available to the government . . . "[58] The mere fact that George was illiterate does not render the use of certified mail unreliable, or the return receipt suspect. Absent credible evidence to the contrary, it must be presumed that George received the letters, and thus received adequate notice of the GLO's planned rejection of his allotment application and the reasons for it. In addition, because George did not request a hearing, nor

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[57] AR 209-10

[58] *Lord v. Babbitt*, 991 F.Supp. 1150, 1167 (D. Alaska 1998)

submit evidence opposing the rejection, and thus no hearing was required.

There is also nothing in the record to suggest that the 1930 rejection of George's application constituted a manifest injustice.[59] Apart from the issue of notice, the record includes evidence that George moved to Fort Yukon and had, in essence, abandoned the tract of land described in his 1916 application. As noted above, the Plaintiffs acknowledge that George moved to Fort Yukon in 1924, and Carlisle, the GLO examiner, reported in 1929 that the improvements on the land had fallen into disrepair. Moreover, the handwritten letter – which the Plaintiffs imply was not from George and did not represent his views – is consistent with the fact of his move to Fort Yukon, and Carlisle's report that the improvements were "going to pieces" after five years of lack of use.

Because no objection was made to the 1930 rejection of George's application, nor was the propriety of the decision challenged for the next 75 years, the Court finds no basis for concluding that the rejection of the application violated due process or constituted

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[59] *See Erling Skaflestad Donnie Skaflestad*, 155 IBLA 141, 148 (2001) ("Under the doctrine of administrative finality – the administrative counterpart of the doctrine of res judicata – when a party has had an opportunity to obtain review within the Department and no appeal was taken, or an appeal was taken and the decision was affirmed, the decision may not be reconsidered in later proceedings except upon a showing of compelling legal or equitable reasons, such as violations of basic rights of the parties or the need to *prevent an injustice*.) (emphasis added).

a fundamental injustice that could justify reinstating the application.

### C. Statute of Limitations and the 1930 Rejection

The government contends that the Plaintiffs' argument that equitable title vested in George at the time of the 1920 approval of his application, making the GLO's 1930 rejection unlawful, is barred by the statute of limitations. Plaintiffs respond that they are asking the Court to review the BLM's March 6, 2006 decision – not the 1930 rejection – and therefore the action is not time barred.

As explained above, the BLM's March 6, 2006 letter declining to reopen the allotment application is not subject to judicial review, and the IBLA's decision affirming the BLM must be upheld. To the extent the Plaintiffs' equitable-title argument directly challenges the 1930 decision, their action is barred by the well-established six-year limitations period for such actions. The Plaintiffs base jurisdiction over the United States, in part, on section 345 of the General Allotment Act, which permits federal courts to decide whether an Indian allottee has been deprived of an allotment or rights connected with an allotment.[60] The Ninth Circuit has recognized section 345 as a limited

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[60] *Big Spring v United States*, 767 F 2d 614, 616 (9th Cir. 1985).

waiver of the government's sovereign immunity.[61] But it has also held that section 345 is subject to the six-year statute of limitations under 28 U.S.C. § 2401(a).[62]

## V. CONCLUSION

For the reasons stated above, the Plaintiffs' action is dismissed in its entirety. The Court DENIES the Plaintiffs' motion for summary judgment at Docket 27, and affirms the decision of the Department of the Interior's Board of Land Appeals in *Heirs of Dick George*, IBLA 2006-152 (2007).

DATED this 31st day of March 2009.

/s/ Timothy Burgess
Timothy M. Burgess
United States District Judge

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[61] *Id*; *Christensen v. United States*, 755 F.2d 705, 707 (9th Cir 1985).

[62] *Christensen*, 755 F.2d at 707

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

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|---|---|
| GRACE HENZLER; et al.,<br>Plaintiffs-Appellants,<br>v.<br>KEN SALAZAR, in his official capacity as Secretary of the Interior; et al.,<br>Defendants-Appellees. | No. 09-35597<br>D.C. No. 3:07-cv-00220-TMB<br>District of Alaska, Anchorage<br>ORDER<br>(Filed Oct. 20, 2010) |

Before: SCHROEDER, O'SCANNLAIN and CLIFTON, Circuit Judges.

The panel has voted to deny the petition for rehearing en banc.

The full court has been advised of the petition for rehearing en banc, and no judge of the court has requested a vote on it. Fed. R. App. P. 35.

The petition for rehearing en banc, filed September 4, 2010, is DENIED.

UNITED STATES
DEPARTMENT OF THE INTERIOR
GENERAL LAND OFFICE
WASHINGTON

IN REPLY PLEASE REFER TO
Fairbanks 0480 "K" EOR

[June 20, 1930]

: Indian allotment application
: rejected subject to appeal.

Register & Receiver,

Fairbanks, Alaska.

Sirs:

May 29, 1916, Dick George filed, under the act of May 17, 1906 (34 Stat. 197), application for Indian allotment serial 0480 for the following described unsurveyed land:

> "160 acres tract. Included in claim where Stake No. 1 is on R. L. Yukon River two miles above Ray River. Thence 2640 feet up stream to Stake No. 2, thence 2640 feet N. to Stake No. 3, thence 2640 ft. W. to Stake No. 4, thence 2640 ft. S. to Stake No. 1, the place of beginning. All corners posted and lines blazed.

Said application was approved by the Department on March 22, 1920. However, certificate of allotment did not issue for the reason that the lands were unsurveyed. On November 5, 1929, Mineral

Examiner H, K. Carlisle submitted a report which was approved by the Chief of Field Division on November 23, 1929, and by Mr. E. J. Beck, Superintendent, Central District, Office of Education, November 25, 1929, wherein it is stated that this Indian lived upon this land during the summer at the time the application was made and had some improvements on the land. However, in 1924, he moved to Fort Yukon, which is 230 miles from the land. He has indicated that he intends to make his home at Fort Yukon and he does not intend to make any further use of the lands included in application 0480 and as the improvements are going to pieces for the reason that they have not been used, recommendation was made that the application be finally rejected and the case closed.

You will advise the Indian and the proper superintendent, Office of Education, hereof and allow them 60 days from notice within which to show cause why the application should not be rejected, or within which to file application for other lands if the Indian so desires, failing in which recommendation will be made by this office to the Department that the approval be canceled and the application finally rejected in its entirety and the case closed without any further notice from this office.

Serve notice and in due time report the action, if any taken, with evidence of service.

Very respectfully,

/s/ Sd (C. C. Moore)
Commissioner.

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App. 31

Fairbanks, Alaska

July 9, 1930.

Fairbanks 0480.

Mr. Dick George,

Fort Yukon, Alaska.

Dear Sir:

The inclosed copy of letter "K" EOR of the Commissioner of the General Land Office dated June 20, 1930, is for your information and action.

Accordingly you will be allowed 60 days from the receipt of this notice in which to protest against the cancellation of your allotment application in case you desire to hold the tract. If you do not want to hold the tract no action is necessary and your application will be rejected after 60 days.

If you want another tract please so notify this off ice [sic] and the necessary papers will be sent to you for that purpose with instructions.

Very respectfully,

Robt. W. Taylor,
Ex-officio Register.

By /s/ Clerk L.O.